No. 558.

Brief of Burton for P. E. (me

Filed Jan. 17, 1898.

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JAMES H. McKENNEY,
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No. 558.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

OCTOBER TERM, 1897.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

Memorandum in Behalf of the Motion by Plaintiff in Error.

I.

Compliance with the Act of Congress operated as a supersedeas.

Slaughterhouse Cases, 10 Wall, 273.
Goddard *v.* Ordway, 94 U. S., 672.

II.

The jurisdiction of the State Court ceased when the writ was allowed and bond accepted.

Draper *v.* Davis, 102 U. S., 370.
Keyser *v.* Farr, 105 U. S. 265.

III.

The doctrine as to supersedeas applies in quo warranto cases as in others.

United States *v.* Addison, 22 How., 174.
Coms. *v.* Gorman, 19 Wall, 661; also 86 U. S. (Lawyer's Coop. Ed.), 148.
Foster *v.* Kansas, 112 U. S., 201.

IV.

The Court will mould its order to suit the exigency of the case. It has a right to issue any writ which may be necessary to render its appellate jurisdiction effective.

Rev. Stat. sec. 716.
Ex parte The Milwaukee Railroad Co., 5 Wall, 188.
Goddard *v.* Ordway, 94 U. S., 672.

V.

As to the writ of possession.—Where a writ of error, bond and citation were in due season to operate as a *supersedeas*, and an execution was issued from the lower court notwithstanding, the Supreme Court issued a *supersedeas* to supersede and quash the execution.

Stockton *v.* Bishop; 2 How., 74.

So the writ was issued in Green *v.* Van Buskerk, 3 Wall, 448, where the execution had been issued, and placed in the Sheriff's hands.

VI.

But the State Court says that its judgment was self executing, and therefore the relator was in office as soon as it was rendered, and the *supersedeas* came too late. Foster

v. Kansas, 112 U. S., 201, is relied on. But the point in that case is that the judgment made a vacancy, and the proper authority appointed Moore to fill it on the 7th, on which day Moore qualified and entered upon the discharge of the duties of the office. The *supersedeas* went into effect on the 8th—a day too late to undo what had been done. In the present case nothing had been done except to issue a writ. We therefore have a *supersedeas* that does not supersede. The judgment is suspended. The *status quo ante decretum* is to be preserved—for such is the object of the doctrine. [Butchers Association *v.* Slaughter House Co., 1 Woods 50.] The power of the judgment is gone; yet the judgment operates to entitle the relator to the office and authorizes him to take possession by force, oust the plaintiff in error, and assume the discharge of the duties of the office. If this be true, there never can be a *supersedeas* in any case of *quo warranto*, and U. S. *v.* Addison is not law.

The opinion of the State Court as to the effect of its judgment was rendered on the 24th of December—the day after the *supersedeas* took effect. It jurisdiction was then superseded (Draper *v.* Davis, *supra*). It could recall its own execution. But it could not enforce its judgment, or take any further steps in the cause, (Goddard *v.* Ordway *supra*). Hence what it says about the effect of its judgment is the enunciation of a court without jurisdiction. It is for this Court to declare the effect of the decision and of the *supersedeas*.

Citizens Bank of Wichita *v.* Farwell, 56 Fed. Rep., 539.

VII.

The defendant in error may say he was not proceeding under any judgment—that he was not executing any judgment—but was acting independently of it. But it is too late for him to put himself on any such ground. He submitted his claims to the action of the courts by instituting pro-

ceedings in *quo warranto* and assertingh is title through the State Courts. After having won in the State Courts, it is too late for him to abandon the process of the law, when the jurisdiction of this Court has attached to the action instituted by himself. He cannot be allowed to say "I stand by the law as long as it stands by me; but when I am carried to another Court, I abandon the whole thing, and will be a law unto myself."

The *supersedeas* operates to prevent the successful party in the Court below from proceeding to enforce his judgment, (4 Minor's Institutes, 325); and he is none the less enforcing it when he forcibly obtains possession of the physical property and is declared by the State Court to be lawfully in possession and protected by its powers.

In general, when a *supersedeas* is allowed, the remarks of Chief Justice Marshall in Yeaton *v.* U. S., 5 Cranch, 281, are pertinent:

"The majority of the Court is clearly of the opinion that in admiralty cases an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court is pronounced."

In discussing the history of *supersedeas*, Walworth, Chancellor, says in Hart *v.* Albany, 3 Paige Ch. Rep. (N. Y.), 383:

"During this contest it was a matter of course that the Lords for the purpose of sustaining the jurisdiction which they claimed, should prohibit the respondent from taking any steps in the cause in the Court of Chancery pending the appeal, whatever injury he might sustain by the delay."

"In many cases this power (to stay execution) operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ."

Freeman on Ex., sec. 32.

Supersedeas is a writ that lies in a great many cases, and signifies, in general, a command to stay some ordinary pro-

ceedings at law, on good cause shown, which ought otherwise to proceed.

Abbott Law Dic., citing Fitz. Nat. Brev., 236.

In the practice of the Supreme Court the meaning of the expression "the writ is a *supersedeas*" is that the writ of error operates to stay proceedings.

Abbott, *supra*.

Bouvier Law Dic.: "The name of a writ containing a command to stay the proceedings at law. 2. It is granted on good cause shown that the party ought not to proceed."

The appellate jurisdiction of this Court is not effectual, it is respectfully submitted, if the respondent can practically defy the resort to it, by taking charge of the office and assuming to discharge its duties, when his own suit to establish his title and secure his admission is still pending.

In the interest of justice and of respect for the due administration of Law the respondent should be compelled to restore the petitioner, and await the decision of this Court as he did that of the State Court.

Respectfully submitted,

R. O. BURTON,
Attorney for Plaintiff in Error.

RALEIGH, N. C., Jan. 12, 1898.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

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UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, *Plaintiff in Error,*

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, *Defendant in Error.*

Supplemental Memorandum for Plaintiff in Error.

The following is the North Carolina statute as to *supersedeas* in *quo warranto* cases:

"In every such case (to try title to office) judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require. Whenever in any civil action brought under sections 607 and 608 of The Code, to try the title or right to hold any office, the judgment of the Court shall be in favor of the relator in such action, it shall be the duty of the Court to issue a writ of *mandamus* or other process in such action which may be necessary and proper to carry such judgment into effect, and to induct the party so entitled into such office. No appeal by the defendant from the judgment of the Superior Court in such action to the Supreme Court shall stay the execution of the judgment, unless a justified undertak-

ing be executed on the part of the appellant by one or more sureties, in a sum to be fixed by the Court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all money whatsoever received by such appellant by virtue or under color of his said office: *Provided*, that in no event shall said judgment be executed pending said appeal, unless a justified undertaking be executed on the part of the appellee by one or more persons in a sum to be fixed by the Court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of his said office during his occupancy thereof." The Code of N. C., sec, 610 as amended by Acts of 1885, ch. 406.

So by the Acts of 1895, ch. 105, sec. 1, the defendant in actions of this kind is not allowed to plead until he gives bond to cover all costs and damages.

The section of The Code (611) cited by the respondent, applies to cases where there is no appeal and *supersedeas*.

The general law as to appeals is contained in The Code, sec. 558: "Whenever an appeal is perfected as provided by this Code, it stays all further proceedings in the Court below upon *the judgment appealed from*, or upon the matter embraced therein; but the Court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the Court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee or other person acting in another's right; and may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum."

R. O. BURTON,
For the Motion.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

PLAINTIFF'S BRIEF

made, but to find the janitor and get from him a key. Later the said Jones returned with Mr. Day, one of the attorneys for Messrs. Caldwell and Pearson, and also with the janitor, who said he did not have a key. This affiant repeated his advice and suggested getting a key from Mr. Brockwell, a locksmith. Something was said about the possibility of the granting of a *supersedeas*, and therefore the need of haste. Affiant told the Sheriff that he need not assume that a *supersedeas* would be granted, but if notice of *supersedeas* should be given him, to proceed no further till morning, as affiant would want to look into the matter before advising him; that he had till the meeting of the Court in February to execute the writ and make his return.

T. M. ARGO.

Sworn to and subscribed before me this 13th day January, 1898.

H. H. ROBERTS,
Notary Public.

AFFIDAVIT OF HAM T. JONES.

HAM T. JONES, being duly sworn, says that he is the Sheriff of Wake County, North Carolina; that the execution or writ of possession in these cases was delivered to him by W. H. Day, Esq., about 6:30 o'clock, p. m., on the 23d of December, 1897, and he went with Day to the porch of the State building which contains the Commission rooms, the State Museum, the Agricultural Department and the Experiment Station. Finding the doors locked, the affiant declined to break open the same, but said he would go and find the janitor. Not finding him, he went to consult with Col. T. M. Argo, one of the leading lawyers of the Raleigh bar, and he advised him not to break open said doors, as no one was in and no demand had been made. Later, about 9:30 o'clock, p. m., Mr. Day went with him to see Col. Argo, and also the janitor, who stated that he did

not have the key. Colonel Argo repeated his advice, and in reply to some suggestion as to the issuing of a *supersedeas*, said Argo stated that it was not incumbent on the affiant to anticipate a *supersedeas*, but to discharge his duty as he would in any other case; that as no one was in the Commission rooms no demand to open the doors had been made, and until such demand was made, affiant had no right to break open the doors. He also suggested getting a key from Brockwell. Affiant has never executed the writ of possession. At some time during the night of December 23d, 1897, Messrs. Caldwell and Pearson got into said rooms themselves, and have since been in possession thereof, with the books, papers, etc., pertaining to said office.

J. W. Wilson and S. Otho Wilson were not in the city on said night. Affiant had heard directly from Judge Whitaker, before he went to consult T. M. Argo the last time, that a writ of error had been allowed by the Chief Justice, but no formal notice had been served on him.

HAM T. JONES.

Sworn to and subscribed before me this 13th day of January, 1898.

H. H. ROBERTS,
Notary Public.

AFFIDAVIT OF T. F. BROCKWELL.

T. F. BROCKWELL, being duly sworn, says that he is a locksmith in the city of Raleigh, N. C. On the night of December 23d, 1897, he received a message to come to the Executive Mansion and bring tools to pick a lock. Affiant went up and saw the Governor of the State, who told him to go with Messrs. L. C. Caldwell and John H. Pearson, who were present, and pick the locks of the Railroad Commission rooms and open the doors. Affiant went with said Pearson and Caldwell from the Executive Mansion, picked said locks about 11:30 o'clock P. M. on said night, and the

said Caldwell and Pearson immediately entered and took possession, and by their instructions affiant at once put new locks on the doors. Affiant know nothing of the writ of error or of its effect.

T. F. BROCKWELL.

Sworn to and subscribed before me this 11th day of January, 1898.

H. H. ROBERTS,
Notary Public

AFFIDAVIT OF SPIER WHITAKER.

SPIER WHITAKER, being duly sworn, says that he was one of the counsel for the plaintiffs in error, and was present when the writ of error in these cases was allowed by the Chief Justice of the State Court and when the bond was accepted and the citation signed by him. He was also present when the said papers were filed in the office of the Clerk of the Supreme Court and the copies lodged for the defendants in error at 7:10 P. M. on said 23d day of December, 1897. As soon as this was done affiant started to the house of Mr. Day, one of the counsel of the defendants in error, but saw him in the Capitol Square, about fifty yards from the Commission rooms. Affiant told him the writ of error had been allowed and the *supersedeas* granted. This was a very short while after seven o'clock P. M. Soon thereafter affiant went to the office of the Sheriff and notified him that the *supersedeas* had been granted, and notified him also that he would be guilty of contempt of the Supreme Court of the United States if he proceeded further with said writ. James W. Wilson and S. Otho Wilson were absent from the city and had been for several days.

SPIER WHITAKER.

Sworn to and subscribed before me this 11th day of January, 1898.

H. H. ROBERTS,
Notary Public